UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
JACK WEICHMAN,	)	CASE NO. 08-23482 JPK
	)	Chapter 11
Debtor.	)	
**********		
DOMENICO LAZZARO, MD,	)	
JOSEPH PABON M.D. and	)	
ASSOCIATED PATHOLOGISTS	)	
OF MUNSTER INDIANA, P.C.,	)	
Plaintiffs,	)	
v.	)	ADVERSARY NO. 09-2095
JACK WEICHMAN,	)	
Defendant.	)	

MEMORANDUM OF DECISION/ORDER CONCERNING MOTION TO DISMISS AMENDED COMPLAINT FOR DETERMINATION OF DISCHARGEABILITY UNDER 11 U.S.C. § 523 ("MOTION")

By order entered on January 21, 2010, the court granted the defendant's motion to dismiss the plaintiffs' original complaint. The granting of that motion was without prejudice to the plaintiffs' filing of an amended complaint, which by the terms of the January 21, 2010 order was due to be filed by February 18, 2010. The amended complaint was filed on February 19, 2010,[1] and the Motion and a memorandum in support thereof was filed on March 10, 2010.[2] The plaintiffs filed a response to the Motion, in the form of a legal memorandum, on April 9, 2010. Pursuant to the court's order entered on April 13, 2010, the defendant filed a legal memorandum in reply to the plaintiffs' response on May 10, 2010.

[1] The defendant has not asserted an issue concerning the one-day delay in the filing of the amended complaint, and any issue as to untimeliness of the filing of the amended complaint has thus been waived. Had the issue been raised, the court would not have dismissed the amended complaint for a one day delay in its filing.

[2] A duplicate of the Motion and its supporting memorandum was also filed on March 12, 2010; the court can discern no difference between the March 10, 2010 and the March 12, 2010 filings, and thus the March 12, 2010 filings are deemed to be duplicates and will not be considered by the court.

There has been no objection to the court's exercise of jurisdiction. The court has jurisdiction of this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and (b), and N.D.Ind.L.R. 200.1. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

I. ISSUE BEFORE THE COURT

The issue before the court arising from the Motion is whether the plaintiffs' amended complaint should be dismissed pursuant to Fed.R.Bankr.P. 7012(b)/Fed.R.Bankr.P. 12(b)(6). No materials outside of the record established by the pleadings have been filed, and the Motion is therefore to be determined strictly pursuant to the provisions of Rule 12(b)(6).

II. ANALYSIS

As was true with the original complaint, the amended complaint seeks to assert actions against the defendant pursuant to 11 U.S.C. § 523(a)(2), 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6). The defendant asserts that the amended complaint fails to assert claims for relief cognizable under applicable law and rules against him. The plaintiffs assert that the amended complaint sufficiently asserts claims against the defendant.

The format of the amended complaint is in a pattern all too familiar to the court, and one which the court does not endorse. The complaint begins with a required statement of the court's jurisdiction, which is fine. The complaint then proceeds to identify the parties, which is fine. The complaint then states a lengthy recitation of "Facts" which do not form a part of any asserted count, but rather apparently are deemed to state underlying facts necessary for all of the designated counts in the complaint. The complaint then has three designated counts – one under each of the above-designated exceptions to discharge provided by the Bankruptcy Code – which consecutively incorporate by reference all of that which preceded them in the complaint, including rhetorical paragraphs 1-53. Most woefully, each succeeding count incorporates each preceding count's averments. Some of these incorporated allegations are

pertinent to certain of the causes of action alleged subsequently, but some of them are only pertinent to a specific count. This form of pleading is obnoxious, in that it causes the court to review facts which are not pertinent to a particular Count and sort those facts out, as one would grain from chaff, to determine whether a particular Count actually asserts a claim cognizable under applicable law. Fed.R.Bankr.P. 7008(a) incorporates the provisions of Fed.R.Civ.P. 8 into adversary proceedings. Fed.R.Civ.P. 8(a)(2) requires that a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief". Fed.R.Civ.P. 8(d)(1) requires that "(e)ach allegation must be simple, concise and direct". Incorporating an omnibus statement of facts and averments of preceding counts into various counts violates both of these rules, and is simply not an appropriate manner in which to plead a federal complaint. That being said, the court will review the complaint in the manner in which it has been submitted, with a caution to the plaintiffs' attorney to do better in the future.

The Amended Complaint is essentially a "fleshed out" version of the original complaint in which certain specific allegations have been added in an attempt to comply with Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b), both of which are applicable to adversary proceedings by provisions of the Federal Rules of Bankruptcy Procedure. The January 21, 2010 order noted the deficiencies in the original complaint, and many of the rhetorical paragraphs of the original complaint reappear in the amended complaint. For the purposes of differentiating the material manner in which the amended complaint differs from the original complaint, the court notes the following with respect to additions made by the amended complaint:

A. With respect to the generic statement of facts [rhetorical paragraphs 6-53 in the amended complaint] – the following material provisions have been inserted into the amended complaint:

> 13. Lazzaro was committed to his medical practice and the long hours of work necessitated by that practice. He, therefore, employed Weichman, a professional accountant, to oversee his

financial affairs. It was reasonable, under those circumstances, for Lazzaro to rely and depend on Weichman to act professionally and in Lazzaro's best financial interest.

17(g). U.S. 30 Restaurant Partnership was a corporation whose shareholders included Drs. Ashbach, Pascale, De La Paz, Lazzaro and Jack Weichman.

18. Lazzaro invested approximately $97,000 in U.S. 30 Building Partnership based upon Weichman's advice, made on or near February 9, 1989, at Weichman's office, that U.S. 30 Building Partnership would be a profitable entity. Weichman controlled the check book for U.S. 30 Building Partnership. Weichman called no partnership meetings and maintained no meeting minutes. Weichman never provided Lazzaro with monthly reports or other regular updates as to U.S. 30 Building Partnership's status. Lazzaro earned nothing on his investment in U.S. 30 Building Partnership and lost every dollar of his initial investment in the business. To date, the only holding remaining in the U.S. 30 Building Partnership is land in Hammond, Indiana.

19. Lazzaro also invested approximately $67,000 in U.S. 30 Restaurant, Inc., based upon Weichman's advice, made on or near April 11, 1989, at Weichman's office, that it would be a profitable investment. Again, Weichman never provided Lazzaro with monthly reports, balance sheets, or ledgers. And, again, Lazzaro earned nothing on his investment in U.S. 30 Building Partnership and lost every dollar of his initial investment in the business.

20. Lazzaro invested approximately $35,000 in Landings, Inc., based upon Weichman's advice, made on or near May 5, 1990, at Weichman's office, that it would be a good and profitable investment. Weichman controlled the check book for Landings, Inc. Weichman provided no monthly reports; he provided no income statements; he provided no balance sheets. Lazzaro earned nothing on his investment in Landings, Inc., and lost every dollar of his initial investment in the business.

21. Lazzaro invested approximately $98,500 in the Dunes on Weichman's advice, made on or near August 2, 1989, at Weichman's office, and projections that it would be profitable. Weichman maintained full control over the Dunes business. Weichman controlled the Dunes' check book. Lazzaro received absolutely nothing back on his investment in the Dunes, and he lost every dollar of his initial investment in that business.

22. When Lazzaro invested in Broadmoor, Inc., on or about May 13, 1986 and again on December 31, 1986, Lazzaro believed

that Weichman guaranteed a profit on that business. Lazzaro invested approximately $505,500 in the business, because Weichman, at Weichman & Associates' office, had presented Broadmoor to him as a good investment that would be profitable and grow in value over time. Weichman's representations to Lazzaro to encourage him to invest his money in Broadmoor were either knowingly false or made to Lazzaro with reckless disregard for the truth as, on information and belief, Weichman was advising other investors in Broadmoor and the other investment entities, at or near the same time that the above-described representations were made to Lazzaro, that Broadmoor and other entities, was only to be a tax shelter and not designed to be profit making. Again, Lazzaro was not kept apprized of Broadmoor's financials by Weichman, who retained near, if not, total control over the business. With that control, Weichman unilaterally made the decision to and did use the Broadmoor entity to employ himself and entities that he owned or had an ownership interest in paying from the Broadmoor account to himself or his entities approximately $1,250,826. Lazzaro had no knowledge of these transactions and self-dealing by Weichman of approximately $100,000 until after the underlying matter was filed.

23. Associated Pathologists invested pension plan money in Broadridge based upon representations made by written correspondence from Weichman, at Weichman & Associates to Lazzaro at his home address, in St. John, Indiana, on or about July 7, 1988, as to its profitability. (*See* attached Exhibit "E"). Again, despite repeated requests from the Lazzaros, on behalf of Associated Pathologists, Weichman refused or neglected to provide financial information about the investment.

24. Overall, through the entire period in issue, Weichman actively sought to mislead, confuse, and/or falsely represent the financial position of the various entities to secure added capital from the Lazzaros and to permit the entities to continue in existence for the purpose, in whole or in part, of regularly securing payments from the investment entities to himself and entities, which he owned and operated.

25. As between the entities in which the Lazzaros invested, and specifically referenced in paragraphs 17 through 23 above, Weichman caused money to be moved from one entity to another entity, as if he were the sole owner of all entities. Weichman took no notice of the difference in organization of ownership in the entities.

29. Weichman ran the overall medical practice of Associated Pathologists. As a result, the Creditors never saw bank statements. The Creditors never had general ledgers for

Associated Pathologists. From 1988 until 1999 Creditors never received general ledgers. Through the same period MMDS, also a Weichman controlled entity, did all the billing for Associated Pathologists.

30. Throughout the late 1980's and early 1990's, despite ongoing requests for information as to his investments, Lazzaro was provided little to no information. Weichman prepared Lazzaro's and Lazzaro's wife's individual tax returns. In addition, he prepared the corporate tax returns for Associated Pathologists. And he prepared all the tax returns for the various investment entities, i.e., Broadmoor, U.S. 30 Building Partnership, U.S. 30 Restaurant, Inc., The Landings, Inc., Dunes Hotel, and Broadridge.

31. While Lazzaro received copies of his individual tax returns, he was never provided with any of the K-1s for the various investment entities until approximately January, 2000, when he retained new accountants, Crowe Chizek. He did not ask about K-1s or question the issue, because he did not know what K-1s were or even enough to know that K-1s should exist. No regular reports with respect to the investment entities were provided to him during this period. Again, this was in keeping with Weichman's goal to mislead them as to his overall financial position and the financial position of the individual entities, as this allowed Weichman to keep taking the Creditors' assets for himself.

35. Indeed, Weichman had advised them they would be profitable to secure investment money from Lazzaro.

38. In 1989, rough, hand-written notes were provided to Lazzaro listing some investments and summarizing what Weichman orally represented to Lazzaro at a meeting at Weichman's office. *See* attached Exhibit "F". This was incomplete, inaccurate, and misleading.

39. Thereafter, nothing more was provided, despite requests, until 1992 when incomplete and very cursory ledger sheets with a few notes were provided to the Lazzaros. At that time Weichman's agent, Thomas Swihart, at Weichman's office, represented to the Lazzaros, orally, the status of his investment and the financial position of various investment entities in the same manner and content as represented on those ledger sheets, which are attached hereto as Exhibit "G".

40. The cursory notes were not only incomplete but wrong in what they purported to convey. The records provided by Weichman did not reflect an August 22, 1999, contribution of

$7,500. Moreover, the 1989 noted contribution of $76,000 was incorrect, as that contribution had totaled $77,000. Two checks had been written by Lazzaro making contributions to the Dunes Hotel in 1989, totaling $77,000. Accordingly, this brought Lazzaro's total investment in the Dunes Hotel from 1989 to 1991 to a total of $84,500, rather than the $76,000 as reflected by Mr. Weichman's ledgers.

41. In addition, the journal page for the Landings, attached Exhibit "G", p.1, is inaccurate in its noted amounts. While Weichman reported a $16,000 contribution, in fact, Lazzaro contributed $35,000. These errors raise the inference that Weichman did not intend to benefit Lazzaro through profit making or tax savings. His inaccurate figures/record keeping just further supports that Weichman's motivation for seeking investment monies from Lazzaro, as well as control over Lazzaro's and Pabon's medical practice, was to position himself to profit.

42. In short, Lazzaro was largely kept in the dark about these investment entities. He had no knowledge of large sums of money moving between the investment entities. He had no knowledge of checks written on the entities to Weichman or to Weichman owned businesses, such as Computer Management Services, Weichman Development Corporation, Jack Weichman, Escrow, and to Jack Weichman personally. He was never told when he invested that these amounts of money would be moved into Weichman-owned entities. Nevertheless, substantial amounts were paid from the investment entities to Weichman-owned entities. In fact, the payments to Weichman and Weichman's entities totaled over 1.25 million dollars.

43. By 1993, Lazzaro had quit investing money with Weichman, and the investment entities that he had recommended to Lazzaro, because Lazzaro had major concerns about what specifically was happening. Creditors stayed with Weichman as their CPA and practice manager, because he continually told Lazzaro that he had relationships with other doctors and hospital administrators, who were under his control. Essentially, Weichman sought to intimidate Creditors into staying with him to prevent them from discovering the monies that he had hidden, falsely reported, and/or fraudulently garnered for himself.

45. Additionally, Weichman acted as Lazzaro's broker on his personal Blunt Ellis Loewi investment account.

46. After he worked with Lazzaro and Lazzaro's wife, Patricia Lazzaro, to open a Blunt Ellis Loewi personal investment account for them, on or about February 20, 1987, on information and belief, Weichman forged Domenico Lazzaro's signature and

Patricia Lazzaro's signature to a document expanding the accounts activities to include options and commodities trading. (*See* attached Exhibit "A").

47. At no time did the Lazzaros authorize Weichman to execute the options trading document, attached Exhibit "A", on their behalf. Weichman had the investment account statements delivered to his office. Lazzaro, again, was denied information.

48. Once the Lazzarros learned that options trading had been engaged in on their account, they closed the account. As the records for this account have not been produced by Weichman, the Lazzaros cannot ascertain with exactness the amount of money, which they have lost in these unauthorized transactions.

49. In approximately 1987, on information and belief, Weichman opened a second account at Blunt Ellis Loewi. This account was in the name of Associated Pathologists of Munster. This second Blunt Ellis Loewi account, the corporate account, was opened without the knowledge of Domenico Lazzaro, Patricia Lazzaro, and/or Joseph Pabon.

50. Between the years of approximately 1987 and 1992, at the direction of Weichman, approximately 1.3 million dollars was put into the Associated Pathologists' corporate account with Blunt Ellis Loewi with virtually all of the deposits being removed to an unknown locale on the very same day or within a one day period of being deposited. The specific dates and transactions are more fully set forth on attached Exhibit "B", which is incorporated herein as if fully set forth. Exhibit "D", also incorporated herein, provides a summary total of the monies moved into and out of this account.

51. At no time, until approximately March, 1999, did Patricia Lazzaro, Domenico Lazzaro, or Joseph Pabon know of the Blunt Ellis Loewi account or the 1.3 million dollars transferred into and out of that Associated Pathologists' Account. Weichman was never authorized to open or take any of the actions that he took with respect to manipulating Associated Pathologists' money into and out of the account.

52. Weichman has produced no documents or information to explain what he did with the money that he directed transferred into and out of the Associated Pathologists' Blunt Ellis Leowi account. Although holding himself out as a professional, who would manage their money, in fact, Weichman intentionally violated that representation and trust by assuming control over Lazzaro's, Pabon's and Associated Pathologist's funds that was not authorized, was irresponsible, and, to date, remains unexplained. The 1.3 million dollars simply disappeared, with the

exception of the $70,000 referenced in paragraph no. 53, from the Associated Pathologists' Blunt Ellis account.

53. On or about February 28, 1990, Weichman executed a draft, on the Associated Pathologists' Blunt Ellis Loewi account transferring $70,000 from Associated Pathologists to Broadmoor, Inc. *See* attached Exhibit "C." Broadmoor, Inc., was a personal investment of Lazzaro, not an Associated Pathologists' investment. At no time was Weichman authorized to transfer any monies from Associated Pathologists. Weichman had no authority to execute any Associated Pathologists' checks. At no time was Weichman ever authorized to transfer corporate monies into an individual investment account. At no time were Domenico Lazzaro, Patricia Lazzaro, or Joseph Pabon aware, until after litigation in the underlying matter had commenced, that Weichman had transferred money from Associated Pathologists to Broadmoor, Inc.

B. With respect to Count I, the following material additions have been made:

60. As a result of the fraudulent representations of Weichman, creditors invested in entities he presented to them as profit making and continued to contribute capital based upon and pursuant to Weichman's ongoing representations that the entities were financially sound.

61. As a result of false and misleading statements and the failure to speak when under a duty to do so and to disclose all material facts within his knowledge, creditors lost virtually every dollar invested in the above-described investments.

C. With respect to Count II, the following material additions have been made:

66(b). He encouraged ongoing investments in entities by misrepresenting their profitability.

66(f). On information and belief, Weichman actively encouraged the Lazzaros to open and fund the Blunt Ellis Leowi personal account only to then forge their names to documents to allow him to engage in options trading on the account; the gains and/or losses from which were never disclosed to the Lazzaros.

66(g). In his capacity as business manager for Associated Pathologists, he forged documents, acted outside his authority, and exercised control over 1.3 million dollars, all but $70,000 of which is unaccounted for and that $70,000 was misappropriated by Weichman.

D. With respect to Count III, the following material additions have been made:

73. Creditors hereby incorporate paragraphs 1 through 72 of their Complaint herein.

75. In addition to maintaining personal finances/investments with Weichman through the 1990's, Weichman and his entities, MMDS, Inc. and Weichman and Associates, P.C., provided financial and management services to Associated Pathologists under a contract arrangement. Weichman and his entities had failed to properly provide billing services for Associated Pathologists, pursuant to an agreement between the two entities. In 1999, Associated Pathologists terminated billing services, accounting services, and medical management services with Weichman, MMDS, Inc., and Weichman and Associates, P.C.

76. From approximately 1985 until 2002, Associated Pathologists had a long history of providing pathology services to Community Hospital. In addition to providing pathology services, Associated Pathologists was responsible for the nuclear medicine at Community Hospital for the period 1985 through 2002.

77. With the breakdown in their relationship, Weichman advised Lazzaro, at Lazzaro's office in Community Hospital, at or near the time that Associated Pathologists terminated MMDS's billing services, that he would "have [Lazzaro's] job."

78. Consistent with the ongoing relationship between Associated Pathologists and Community Hospital, in 2002, Lazzaro and Pabon were involved with negotiations to continue the contractual relationship between Associated Pathologists and Community Hospital. At that time, the hospital was undergoing a consolidation with two other facilities, St. Mary Medical Center and St. Catherine Hospital.

79. Knowing the negotiations were ongoing between Associated Pathologists and Community Hospital, in the summer, 2002, Weichman began publicly making inaccurate and negative comments about Lazzaro to the newspaper and others in the community. Specifically, Weichman complained that Lazzaro, as a major stockholder, in Broadmoor acted to obstruct any progress to building repairs and ground maintenance.

80. In June, 2002, Weichman was quoted in the paper as saying "Dr. [Domenico] Lazzaro, a major stockholder, has and continues to obstruct any progress in the building repairs and ground maintenance." On June 2, 2002, Jack Weichman wrote to Mabel Gemeinhart, of the Planning and Building Administrator for the Town of Merrillville, stating that:

> Dr. Lazzaro, a major stockholder, has and continues to obstruct any progress in the building repairs and ground

> maintenance. It may be of assistance to all concerned if you contacted Dr. Lazzaro directly to determine to what his course of action and current attitude is. Luke Pascale and I are attempting to correct the current situation, but are being held "hostage" by Dr. Lazzaro.

(*See* attached Exhibit "H").

81. Later that summer, on or about July 11, 2002, Weichman again wrote Mabel Gemeinhart, again referencing a lack of cooperation and roadblocks by a major stockholder. Moreover, he recommended that Ms. Gemeinhart contact Dr. Domenico Lazzaro. (*See* attached Exhibit "I"). Not only did he recommend contacting Dr. Lazzaro, but went out of his way to associate Dr. Lazzaro with Munster Community Hospital, providing the hospital's address for Associated Pathologists, which was not a stockholder in Broadmoor and had nothing to do with that entity. This could have had no intended purpose but to affect the reputation of Lazzaro and Associated Pathologists with the hospital.

82. Throughout the summer, 2002, the ongoing issues with Broadmoor continued to be a matter of concern in the press, with Weichman repeatedly blaming Lazzaro for obstructing progress in repairing deteriorating property in violation of local ordinances.

83. In addition, in June, 2002, Weichman called Pabon, at Community Hospital, and threatened to sue him for malpractice over a biopsy for Weichman's girlfriend, Jodi. Weichman threatened to report the same to John Gorski, at Community Hospital. Weichman then called Dr. Rosita Ngo, also at Associated Pathologists office in Community Hospital, on June 11, 2002, and accused her of mishandling the case regarding his girlfriend. Pabon felt harassed and intimidated by Weichman's threats.

84. Also in 2002, Weichman further threatened Pabon with a statement that a particular nephrology group would not admit patients at Community Hospital, thus depriving Associated Pathologists of those patients, because of the legal issues pending between Associated Pathologists and the nephrologists.

85. Litigation had, in fact, been brought by the nephrologists, who maintained their primary address as Weichman's office. They sued Lazzaro and Pabon.

86. That litigation, too, reflected Weichman's efforts to cause difficulties for Lazzaro and Pabon. Discovery in that case revealed that at least one member of the Nephrology group, Michael Floyd, did not even know if he was a plaintiff or defendant

in the case. And when deposed, members of the Nephrology group identified Weichman as the source of the information that Lazzaro and/or Pabon had made alleged defamatory statements about the Nephrology group.

87. Doctors Pabon and Lazzaro denied any alleged statements attributed to them in that litigation.

88. Ultimately, that litigation ended when the Nephrologists made no response to Doctors Pabon's and Lazzaro's motion for summary judgment, and judgment was entered in Pabon's and Lazzaro's favor.

89. Despite the ongoing interference from Weichman, during the summer, 2002, Associated Pathologists worked to continue the relationship with Community Hospital.

90. By the end of July, 2002, the parties had agreed that Associated Pathologists would continue to provide pathology and nuclear medicine to Community Hospital.

91. In reliance on that agreement, Associated Pathologists began interviewing physicians and pathologists to join the group to allow for all the work needed by the three hospitals.

92. Weichman had access to information specific to talks about employment with other pathologists. For instance, efforts were ongoing through the summer, 2002, with Associated Pathologists to merge with Dr. Huang. Weichman was Dr. Huang's personal accountant providing Weichman with a means to know about plans between Associated Pathologists and the hospitals. Throughout the merger negotiations, Huang continually "reversed direction." A contract with Huang would be agreed to and then he would decide he did not want certain terms.

93. At all times, it continued to be Lazzaro's understanding that the relationship with Associated Pathologists would proceed as before with Community Hospital until being advised to the contrary in December, 2002.

94. In December, 2002, Lazzaro learned that Weichman had assisted other pathologists to obtain the work from Community Hospital. By his own admission, in fact, Weichman had been intimately involved in this process even going to the hospital to conduct meetings with hospital decision-makers, such as John Gorski.

95. Not only did he interfere with and scuttle the more than 15-year business relationship between Associated Pathologists and

Community Hospital, Weichman again positioned himself and his entities to gain financially at Associated Pathologists', Lazzaro's and Pabon's expense.

96. In addition to the other pathologists, Northwest Indiana Consultants, P.C., obtaining Associated Pathologists' work, Weichman and his entities obtained the billing contract with that pathology group for its services at Community Hospital, St. Mary Medical Center, and St. Catherine Hospital (known as the Community Healthcare System).

97. In fact, the new pathology group, created in October, 2002, Northwest Indiana Pathology Consultants, P.C., had an entity address of 9201 Calumet Avenue, Munster, Indiana, which was also the address of Weichman & Associates. Weichman acquired the billing contract for the new pathology group, even though Dr. Gallagher, a member of that group, had a previously established relationship with APS Medical Billing, in Toledo. Brenda Eriksen, M.D., a member of Dr. Gallagher's group, gave credit to Weichman for her job/ contract with Community Hospital.

99. In addition, the nuclear medicine professional services contract with Community Hospital, which was held by Associated Pathologists, was given to Munster Radiology Group, also a client of Weichman.

100. Thus, Weichman was billing for all the radiology and nuclear medicine professional services for the system.

101. The professional pathology billing for all three hospitals also went to Weichman.

102. Previously, Weichman had only had one hospital, St. Catherine.

103. In other words, despite having a fiduciary obligation to his client, Associated Pathologists, Weichman used information that he obtained through the accountant - client relationship coupled with, an intent to get even or harm Lazzaro to underhandedly interfere with Associated Pathologists long-term business and contractual relationships with Community Hospital damaging, if not completely destroying, Associated Pathologist as an ongoing concern.

108. These allegations were raised by the action that was lately pending in the Lake Superior, Room No. 5, Judge Diane Kavadias Schneider, presiding, which has been removed to this Court and is pending as adversary proceeding Case No. 08-02156-jpk.

The issue before the court with respect to the defendant's Motion is whether the addition of the above-designated pleading material to the original complaint, in conjunction with the other averments of the amended complaint, is sufficient under applicable law and rules to cause the amended complaint to survive the defendant's Rule 12(b)(6) motion.

The basic standard for review of a complaint when challenged by a Rule 12(b)(6) motion was well stated in *In re Carmell*, 424 B.R. 401, 410 (Bkrptcy. N.D. Ill. 2010) as follows:

> A motion to dismiss under Rule 12(b)(6) Fed.R.Civ.P., made applicable by Rule 7012(b) Fed. R. Bankr.P., tests the sufficiency of a complaint rather than the merits of the case. *Gibson v. City of Chi*., 910 F.2d 1510, 1520 (7th Cir.1990). All well-pleaded allegations of the complaint are assumed true and read in the light most favorable to the plaintiff. *Levy v. Pappas,* 510 F.3d 755, 764 (7th Cir.2007). If the complaint contains allegations from which a trier of fact may reasonably infer that proof will be available at trial, dismissal is improper. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund,* 25 F.3d 417, 421 (7th Cir.1994).

As was true with respect to the court's analysis of the original complaint stated in the January 21, 2010 order, we begin with a recitation of the law applicable to the defendant's Motion.

Rule 12(b)(6), made applicable to adversary proceedings by Fed.R.Bankr.P. 7012(b), provides for the defense of "failure to state a claim upon which relief can be granted".

The decision of the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), now provides the definitive standard for allegations which must be provided in a complaint pursuant to Fed.R.Civ.P. 8(a) and the standards by which a complaint is measured under that rule in the face of a Rule 12(b)(6) motion. *Bell Atlantic Corp.* eschewed the long-standing formulation of *Conley v. Gibson*, 78 S.Ct. 99 (1957) – that a complaint does not state a claim only if "no set of facts" could be postulated which would provide a ground for relief. The new standard is stated as follows:

> This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.,* 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the ASSUMPTION THAT ALL THE allegations in the complaint are true (even if doubtful in fact), see, *e.g.*, *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely"). (footnote omitted)

127 S.Ct. 1995, 1964-1965.

As the court stated in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007):

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [citation omitted] A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. [citation omitted] The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. [citation omitted] Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " [citation omitted]

. . .

> [T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [citation omitted] . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. [citation omitted] Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. [citation omitted] But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief." [citation omitted]

The foregoing are the basic standards by which the sufficiency of a complaint is judged against a challenge pursuant to Rule 12(b)(6). In addition, when allegation are fraud are made, or are necessary to be made to sustain a claim, Fed.R.Civ.P. 9(b) [made applicable to adversary proceedings by Fed.R.Bankr.P. 7009] comes into play. The rule states:

> **(b) Fraud or Mistake; Conditions of Mind**. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Application of the requirements of Rule 9(b) is also straightforward. The manner in which compliance is to be had with the rule has been well-defined by the United States Court of Appeals for the Seventh Circuit. In *Graue Mill Development Corp. v. Colonial Bank & Trust Company of Chicago*, 927 F.2d 988, 992-93 (7th Cir. 1991), the following was stated:

> Graue Mill's second argument on appeal is that the district court erred in dismissing the RICO counts in its complaint for failure to allege predicate acts of fraud with sufficient specificity. The starting point for pleading fraud claims under RICO is Rule 9(b) of the Federal Rules of Civil Procedure. That rule states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with *particularity.*" (emphasis added). Rule 9(b) effectively carves out an exception to the otherwise generally liberal pleading requirements under the Federal Rules. We read 9(b) to mean that RICO plaintiffs, like all other parties pleading fraud in federal court, must " 'state the time, place and content' " of the alleged communications perpetrating the fraud. *U.S. Textiles Inc. v. Anheuser Busch Cos.,* 911 F.2d

> 1261, 1268 n. 6 (7th Cir.1990) (quoting *New England Data Servs. Inc. v. Becher,* 829 F.2d 286, 291 (1st Cir.1987)); *see also Moore v. Kayport Package Express,* 885 F.2d 531, 540 (9th Cir.1989). Most importantly, complaints charging fraud must sufficiently allege the defendant's fraudulent intent. *See Haroco v. American Nat'l Bank & Trust Co.,* 747 F.2d 384, 403 (7th Cir.1984), *aff'd on other grounds,* 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). "Cryptic statements" suggesting fraud are not enough; "'[m]ere allegations of fraud ..., averments to conditions of mind, or references to plans and schemes are too conclusional to satisfy the particularity requirements.' " *Flynn v. Merrick,* 881 F.2d 446, 449 (7th Cir.1989) (quoting *Hayduk v. Lanna,* 775 F.2d 441, 444 (1st Cir.1985)). Rather, pleadings must state the "specific content of the false representations as well as the identities of the parties to the misrepresentation." *Moore,* 885 F.2d at 540; *see also Skycom Corp. v. Telstar Corp.,* 813 F.2d 810, 818 (7th Cir.1987) (complaint which "[did] not identify a single [fraudulent] statement ... **or specify why that statement [was] fraudulent"** failed to satisfy the requirements of Rule 9(b)). (Emphasis supplied).

To similar effect is the following statement in *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777 (7th Cir. 1994):

> Rule 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The rule is said to serve three main purposes: (1) protecting a defendant's reputation from harm; (2) minimizing "strike suits" and "fishing expeditions"; and (3) providing notice of the claim to the adverse party. *See Uni*Quality, Inc. v. Infotronx, Inc.,* 974 F.2d 918, 924 (7th Cir.1992); *DiVittorio v. Equidyne Extractive Indus., Inc.,* 822 F.2d 1242, 1247 (2d Cir.1987). Although some have questioned Rule 9(b)'s effectiveness in serving these purposes, the caselaw and commentary agree that the reference to "circumstances" in the rule requires "the plaintiff to state 'the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.' " *Uni*quality,* 974 F.2d at 923 (quoting *Bankers Trust Co. v. Old World Republic Ins. Co.,* 959 F.2d 677, 683 (7th Cir.1992)); *see also Midwest Grinding Co. v. Spitz,* 976 F.2d 1016, 1020 (7th Cir.1992) (stating that in a RICO action "the complaint must, at a minimum, describe the predicate acts with some specificity and 'state the time, place, and content of the alleged communications perpetrating the fraud' ") (quoting *Graue Mill Dev. Corp. v. Colonial Bank & Trust Co.,* 927 F.2d 988, 992 (7th Cir.1991)); *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir.) (stating that Rule 9(b) "particularity" means "the who, what, when, where, and

> how: the first paragraph of any newspaper story"), *cert. denied,* 498 U.S. 941, 111 S.Ct. 347, 112 L.Ed.2d 312 (1990); 5 Wright & Miller, *supra,* § 1297, at 590. (footnote omitted)

This interpretation of Rule 9(b) has been consistently applied by the United States Court of Appeals for the Seventh Circuit, and continues to be so applied. As stated in *Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services, Inc.*, 536 F.3d 663, 669 (7th Cir. 2008):

> Despite its use of inartful terminology, the district court properly dismissed the plaintiffs' fraud claims for failure to state with particularity "who made the fraudulent statement, when the fraudulent statement was made, and how the fraudulent statement was made." *Id.* at *3. The district court did not require the complaint to provide actual evidence of the claims; it merely required that the claims be pleaded with the requisite particularity. *See id.* Moreover, the district court correctly determined that the complaint failed to plead with particularity the who, when and how of the alleged frauds, all of which are required by Rule 9(b) for allegations of fraud. *See Gen. Elec. Capital,* 128 F.3d at 1078; *DiLeo,* 901 F.2d at 627. The district court therefore properly dismissed the fraud counts for failure to comply with Rule 9(b). (footnote omitted) [emphasis supplied].

Synthesis of the requirements of Rules 8(a) and 9(b) have been well stated in opinions of the United States Bankruptcy Court for the Northern District of Illinois in relation to complaints seeking to pursue an action under 11 U.S.C. §523(a)(2)(A). As stated in *In re Carmell*, 424 B.R. 401, 411-12 (Bkrptcy. N.D. Ill. 2010):

> A. Rule 8(a)(2) and Recent Rulings as to Pleading Requirements
>
> Rule 8(a)(2) Fed. R. Civ. P., made applicable by Rule 7008 Fed. R. Bankr.P., generally requires that the pleader provide "a short and plain statement of the claim showing that the pleader is entitled to relief," giving the defendant "fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (*quoting Twombly,* 550 U.S. at 570, 127 S.Ct. 1955). A complaint is plausible when "the plaintiff pleads factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly,* 550 U.S. at 556, 127 S.Ct. 1955). A plaintiff need not include detailed factual allegations, but "the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955 (internal quotations omitted). Plausibility does not require probability, but does require something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949 (*citing Twombly,* 550 U.S. at 556, 127 S.Ct. 1955). "[A] defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case." *Limestone Dev. Corp. v. Vill. of Lemont, Ill.,* 520 F.3d 797, 802-03 (7th Cir.2008).

Subsequent opinions from panels of the Seventh Circuit Court of Appeals suggest that *Twombly* did not "signal[ ] an end to notice pleading in federal courts." *Doss v. Clearwater Title Co.,* 551 F.3d 634, 639 (7th Cir.2008) (*citing Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)); *see also Bissessur v. Ind. Univ. Bd. of Trs.,* 581 F.3d 599, 603 (7th Cir.2009) "Our system operates on a notice pleading standard; *Twombly* and its progeny do not change this fact."); *Smith v. Duffey,* 576 F.3d 336, 339-40 (7th Cir.2009) (suggesting that some opinions have placed excessive meaning on *Twombly*). A complaint should be dismissed if "the factual detail ... [is] so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *St. John's United Church of Christ v. City of Chi.,* 502 F.3d 616, 625 (7th Cir.2007) (*quoting Airborne Beepers & Video, Inc. v. AT & T Mobility LLC,* 499 F.3d 663, 667 (7th Cir.2007)). A Seventh Circuit panel opinion recently observed that, "[t]he task of applying *Bell Atlantic* to the different types of cases that come before us continues. In each context, we must determine what allegations are necessary to show that recovery is 'plausible.' " *Tamayo v. Blagojevich,* 526 F.3d 1074, 1083 (7th Cir.2008); *see also Wilson v. O'Brien,* No. 07 C 3994, 2009 WL 2916849, at *2 (N.D.Ill. Sept.2, 2009) ("The court will apply the notice-pleading standard on a case-by-case basis to evaluate whether recovery is plausible.").

. . .

The foregoing standards must be applied here to an Amended Complaint objecting to discharge and the dischargeability of debt based, in part, on allegations of fraud. Allegations of fraud must properly be pleaded in some detail in conformance to Rule 9(b) Fed.R.Civ.P., made applicable by Rule 7009 Fed. R. Bankr.P. *Borsellino v. Goldman Sachs Group, Inc.,* 477 F.3d 502, 507 (7th Cir.2007). Under Rule 9(b), in "averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with

particularity." *Id.* (*quoting* Fed.R.Civ.P. 9(b)). "The circumstances of fraud or mistake include the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs.,* 536 F.3d 663, 668 (7th Cir.2008) (quotation omitted); *see also Uni*Quality, Inc. v. Infotronx, Inc.,* 974 F.2d 918, 923 (7th Cir.1992) (describing Rule 9(b)'s particularity requirement as the "who, what, where, when and how" of the alleged fraud). This heightened pleading standard applies to all "averments of fraud," regardless of whether those averments pertain to a "cause of action" for fraud. *Borsellino,* 477 F.3d at 507. **Allegations based on "information and belief" do not comply with the specificity requirement unless accompanied by pleadings of asserted facts providing the basis of the belief.** *Interlease Aviation Investors II (Aloha) L.L.C. v. Vanguard Airlines, Inc.,* 254 F.Supp.2d 1028, 1040 (N.D.Ill.2003).

The particularity requirement of Rule 9(b) should be read in conjunction with Rule 8(a)'s "short and plain statement" pleading requirement. *Rezin v. Barr (In re Barr),* 207 B.R. 168, 172 (Bankr.N.D.Ill.1997). Thus, it is not necessary that a plaintiff plead each fraudulent detail, so long as the circumstances constituting fraud have been set forth adequately. *Id.* (*citing Midwest Grinding Co., Inc. v. Spitz,* 976 F.2d 1016, 1020 (7th Cir.1992)). "[T]he who, what, when, and where aspects of the fraud need not be related with exact details in the complaint as a journalist would hope to relate them to general public." *Zamora v. Jacobs (In re Jacobs),* 403 B.R. 565, 573 (Bankr.N.D.Ill.2009). That is, it is only necessary to set forth a basic outline of fraud in order to alert the defendant of the purported fraud he is defending against. *Barr,* 207 B.R. at 173 (*citing Vicom Inc. v. Harbridge Merch. Servs., Inc.,* 20 F.3d 771, 777 (7th Cir.1994)). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b). Moreover, a plaintiff is not required to plead facts as to which they lack access prior to discovery. *Barr,* 207 B.R. at 172-73 (*citing Katz v. Household Inter., Inc.,* 91 F.3d 1036, 1040 (7th Cir.1996)). (Emphasis supplied).

As stated in *In re Wiszniewski*, 2010 WL 3488960 (Bkrtcy. N.D. Ill. 2010):

The Seventh Circuit has explained that a complaint will be dismissed under Rule 12(b)(6) unless it clears "two easy-to-clear hurdles." *E.K. O.C. v. Concentra Health Servs., Inc.,* 496 F.3d 773, 776 (7th Cir.2007). First, the complaint must provide fair notice of the claim and the grounds upon which it rests so that a

defendant can prepare his defense. *Pratt v. Tarr,* 464 F.3d 730, 733 (7th Cir.2006). Second, the allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a " 'speculative level.' " *Concentra,* 496 F.3d at 776 (*quoting Twombly*); *see also Killingsworth,* 507 F.3d at 618 (noting that the plaintiff must plead " 'enough facts to state a claim to relief that is plausible on its face' "). Plausibility means that the allegations in a complaint must permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. Accordingly, a plaintiff's complaint must include allegations about each element of the cause of action, or at least allegations from which a court can draw reasonable inferences about each element. *Twombly,* 550 U.S. at 562.

When a party alleges fraud, as the Plaintiff has done in her complaint, "the circumstances constituting fraud" must be stated "with particularity." Fed.R.Civ.P. 9(b) (made applicable to adversary proceedings by Fed. R. Bankr.P. 7009), Particularity under Rule 9(b) means "the who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir.1990); *see also Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.,* 536 F.3d 663, 668 (7th Cir.2008) ("The circumstances of fraud ... include 'the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.' ") Despite this "heightened pleading standard," *Goren v. New Vision Int'l Inc.,* 156 F.3d 721, 726 (7th Cir.1998), Rule 9(b)'s particularity requirement must be read in conjunction with Rule 8(a)'s "short and plain statement" notice-pleading requirement. *Rezin v. Barr (In re Barr),* 207 B.R. 168, 172 (Bankr.N.D.Ill.1997). Thus, a plaintiff alleging fraud "need only set forth the basic outline of the scheme, who made what misrepresentations and the general time and place of such misrepresentations" in order to adequately alert the defendant of the purported fraud against which he is defending. *Caliber Partners, Ltd. v. Affeld,* 583 F.Supp. 1308, 1311 (N.D.Ill.1984).

The particularity requirement of Rule 9(b) applies to all claims which are based on an underlying fraud, including all three prongs of section 523(a)(2)(A) (false pretenses, false representation, and actual fraud). *See McCallion v. Lane (In re Lane),* 937 F.2d 694, 698-99 (1st Cir.1991). Although the circumstances of the fraud must be alleged with particularity, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b). The two-

> hurdle notice-plus- plausibility standard applies, however, to all allegations of mental state. *See Iqbal,* 129 S.Ct. at 1954. (Emphasis supplied).

The foregoing are the criteria against which the sufficiency of the complaint is to be judged. To apply those criteria, however, it is necessary to determine the elements of the causes of action sought to be asserted by the complaint, and to compare those elements with the allegations of the complaint.

In *In re Hostetter*, 320 B.R. 674 (Bankr. N.D.Ind. 2005), this court set forth the elements of a cause of action which it will apply to actions under 11 U.S.C. § 523(a)(2)(A). While these elements were primarily developed with respect to actions under that statute premised upon "a false representation", the elements also have applicability to an action under that section based upon "false pretenses" or "actual fraud". In *Hostetter*, the following was stated as to the base elements for an action under 11 U.S.C. § 523(a)(2)(A):

> Although the precise formulation and specification of the number of elements varies from decision to decision, in order to sustain a *prima facie* case of fraud under § 523(a)(2)(A), courts have traditionally required a creditor to establish that: (1) the debtor made a representation to the creditor; (2) at the time of the representation, the debtor knew it to be false or the representation was made with such reckless disregard for the truth as to constitute willful misrepresentation; (3) the debtor made the representation with the intent and purpose of deceiving the creditor; (4) the creditor relied on the representation resulting in a loss to the creditor; and (5) the creditor's reliance was justifiable;[FN5] *In re Sheridan,* 57 F.3d 627, 635 (7th Cir.1995); *Mayer v. Spanel Int'l, Ltd. (In re Mayer),* 51 F.3d 670, 673, 676 (7th Cir.), *cert. denied,* 516 U.S. 1008, 116 S.Ct. 563, 133 L.Ed.2d 488 (1995); *In re Maurice,* 21 F.3d 767, 774 (7th Cir.1994). The creditor must prove each element by a preponderance of the evidence. *Grogan v. Garner,* 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991); *In re Bero,* 110 F.3d 462, 465 (7th Cir.1997). Finally, "exceptions to discharge are to be construed strictly against a creditor and in favor of the debtor." *In re Scarlata,* 979 F.2d 521, 524 (7th Cir.1992), reh. en banc den.1993; *In re Zarzynski,* 771 F.2d 304, 306 (7th Cir.1985).
>
> FN5. In *Field v. Mans,* 516 U.S. 59, 70, 116 S.Ct. 437, 446, 133 L.Ed.2d 351 (1995), the Supreme Court held that a creditor's reliance need only be justifiable, not

> reasonable.

320 B.R. at 681. The court further delineated the nature of the representation necessary for sustaining a § 523(a)(2)(A) action, as follows:

> The bottom line is that the defendant must have made the representation of the promise to pay with the intent and purpose of deceiving the creditor; i.e., intentional/actual fraud. As eloquently stated by the Honorable Kent Lindquist:
>
> > This finding of fact as to intention will obviously have to be determined by circumstantial evidence in most cases as direct evidence of the Defendant's state of mind at the time of purchase is seldom expressly indicated. Although this is certainly a difficult task, it is no greater a task than any other cause of action that includes intent or state of mind as a necessary element. And the existence of fraud may be inferred if the totality of the circumstances present a picture of deceptive conduct by the Debtor which indicates he intended to deceive or cheat the creditor. *In re Fenninger,* 49 B.R. 307, 310, *supra; In re Taylor,* 49 B.R. 849, 851, *supra*. The Court may logically infer this intent not to pay from the relevant facts surrounding each particular case. *See, In re Kimzey,* 761 F.2d 421, 424, supra. And a person's intent, his state of mind, has been long recognized as capable of ascertainment and a statement of present intention is deemed a statement of a material existing fact sufficient to support a fraud action. *In re Pannell,* 27 B.R. 298, 302 (Bankr.E.D.N.Y.1983).
>
> *In re Faulk,* 69 B.R. 743, 755 (Bankr.N.D.Ind.1986).

320 B.R. at 684-685. For the purposes of Rule 9(b) with respect to actions premised upon "false pretenses" or "actual fraud", the elements do not differ much from the foregoing. In the court's view, an action for "false pretenses" under § 523(a)(2)(A) differs from an action based upon "false representation" only in the nature of the predicate conduct giving rise to the fraud, i.e., the creation of an appearance of circumstances as contrasted to an actual statement regarding circumstances. The concept of "actual fraud" is a bit more difficult to delineate, but again, that action is premised upon fraudulent conduct, undertaken with the intent and purpose of deceiving another, upon which a creditor justifiably relied, resulting in a loss to the creditor.

In *In re Tsikouris*, 340 B.R. 604 (Bankr. N.D.Ind. 2006), this court addressed its analysis

of the concept of "fiduciary capacity" under 11 U.S.C. § 523(a)(4). In doing so, the court sought to reconcile the somewhat conflicting decisions of the United States Court of Appeals for the Seventh Circuit with respect to this concept. Certain forms of a "fiduciary capacity" have been relatively well-defined by the case of *In the Matter of Marchiando*, 13 F.3d 1111 (7th Cir. 1994). This court commented on *Marchiando*'s analysis as follows:

> The teaching of *Marchiando* is not only that a statutory or contractual designation of an individual as a "trustee" or "fiduciary" has no real relevance to the determination of "fiduciary capacity" under § 523(a)(4). The primary lesson to be learned from the case is that there must be a "res" in existence *before* the designated "fiduciary" relationship truly arises. In this case, the only "res" there is arose only when Tsikouris did not make payments to the union benefit plans *after* the amount of the required payment was determined. Thus, because there was no "res" prior to that time, Tsikouris did not act in a "fiduciary capacity" in any manner with respect to the "debt" which the Plaintiffs seek to except from his discharge.

340 B.R. at 614. The most problematic Seventh Circuit case with respect to a relationship which constitutes a "fiduciary" relationship is *In re Frain*, 230 F.3d 1014 (7th Cir. 2000). This court addressed *Frain*, and synopsized its concept of a "fiduciary capacity" as follows:

> In this Court's view, *Frain* is based upon the premise that a "fiduciary" relationship existed between Frain and his two fellow shareholders – much as would be the case in the relationship among a managing partner and limited partners in a partnership – and that this relationship rose to the level of the "fiduciary capacity" required by 11 U.S.C. § 523(a)(4) *because of* the structuring of the relationship in a way which provided Frain with total control over the focus of the fiduciary relationship: existing assets of the corporation, and the manner in which the corporation would disburse monies on its obligations.
>
> . . .
>
> As the foregoing cases establish, a critical component of a fiduciary relationship within the scope of 11 U.S.C. § 523(a)(4) is a *res* which exists as the focus of the relationship, much as would be the circumstance in the case of an express trust created to manage property deposited into the trust at the inception of the fiduciary relationship; *See, Klingman v. Levinson,* 831 F.2d 1292, 1295 (7th Cir.1987).

Finally, in *In re Whiters*, 337 B.R. 326 (Bankr. N.D.Ind. 2006), the court stated its

construction of the elements of an action under 11 U.S.C. § 523(a)(6). As stated in *Whiters*, determination of cases under § 523(a)(6) has been made extraordinarily complicated by the decision of the United States Supreme Court in *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998). In *Whiters*, the court stated the following as to the basic elements of an action under § 523(a)(6) following the decision in *Geiger*:

> Putting the foregoing together, the Court determines that in order to sustain an action under 11 U.S.C. § 523(a)(6) a creditor must demonstrate the following:
>
> **1. That the debtor's actions caused an "injury" to the person or property interest of the creditor.**
>
> 2. That the debtor's actions which caused the injury were the result of "willful" conduct by the debtor by which the debtor intended to effect an injury to the person or property interest of the creditor.
>
> 3. That the debtor's "willful" acts were undertaken in a "malicious" manner.
>
> Viewed as outlined above, the *Geiger* standard is extremely strict for creditors to meet. That is as it should be. Exceptions to discharge are supposed to hook "bad actors", not those who merely act poorly. When we troll the murky depths of dischargeability from our place on the shore immediately above the dam, our goal is to snare the lampreys in the stream, not the carp and the catfish. Moreover, in the context of 11 U.S.C. § 523(a)(6), as is true with any exception to discharge, the creditor must prove each element of the dischargeability action by a preponderance of the evidence – *Grogan v. Garner,* 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991); *In re Bero,* 110 F.3d 462, 465 (7th Cir.1997), and "exceptions to discharge are to be construed strictly against a creditor and in favor of the debtor." *In re Scarlata,* 979 F.2d 521, 524 (7th Cir.1992), reh. en banc den.1993; *In re Zarzynski,* 771 F.2d 304, 306 (7th Cir.1985). (Emphasis supplied).

337 B.R., at 339. This court further adopted a "subjective" standard with respect to the willfulness element of § 523(a)(6), stating:

> As the emphasized portion of the above-quoted section establishes, reference to the Restatement Second of Torts does not negate a totally "subjective" standard: in order to constitute

> "willful" conduct, a debtor must either "desire the consequences of his act" [target harm to another entity's person or property], or himself/herself *believe* that harm is substantially certain to result from his/her actions. After *Geiger,* there is no room for the "objective" inquiry into the probabilities of harm, because to do so renders the "willful" element of § 523(a)(6) tantamount to the mere intention to act without intending the consequences of the act in relation to the injury. *Geiger* requires "you *knew* that would hurt", not "any idiot would/should have known that would hurt".

337 B.R. 326, 343. Finally, the court defined "malicious" under the statute as follows:

> "Malicious" means " 'in *conscious* disregard of one's duties or without just cause or excuse; it does not require ill will or a specific intent to do harm.' " *In re Thirtyacre,* 36 F.3d 697, 700 (7th Cir.1994) (quoting *Wheeler v. Laudani,* 783 F.2d 610, 615 (6th Cir.1986)) (emphasis added). Consequently, a debtor's actions are not automatically labeled malicious simply because they are wrongful. *In re Posta,* 866 F.2d 364, 367 (10th Cir.1989). There must also be a consciousness of wrongdoing. *In re Stanley,* 66 F.3d 664, 668 (4th Cir.1995). It is this knowledge of wrongdoing, not the wrongfulness of the debtor's actions, that is the key to malicious under § 523(a)(6). *Posta,* 866 F.2d at 367; *In re Cardillo,* 39 B.R. 548, 550 (Bankr.D.Mass.1984). Without it there can be no "conscious disregard of one's duties," *Thirtyacre,* 36 F.3d at 700, only an unconscious one. *Accord, In re Grier,* 124 B.R. 229, 233 (Bankr.W.D.Tex.1991)("Simply because the sale was in violation of the security agreement and was in fact an intentional sale on the part of the debtor should not be enough to trigger a finding of malice."). *See also, Davis,* 293 U.S. at 328, 332, 55 S.Ct. at 153 (a willful and malicious injury does not automatically result from every tortious conversion).
>
> . . .
>
> That being said, "malicious" intent must be established as a separate element. Under this element, per *Thirtyacre, supra.,* the focus of malice is whether the debtor " *deliberately* or *intentionally*" disregarded his/her obligations with respect to the creditor's interests in the debtor's property.

326 B.R. at 349-50.

We now apply the pleading standards of Fed.R.Civ.P. 8(a), as defined by *Bell Atlantic* and its progeny, and of Fed.R.Civ.P. 9(b) – to the elements necessary to establish a base claim under § 523(a)(2), § 523(a)(4), and § 523(a)(6).

Count I (Assertions under 11 U.S.C. §523(a)(2)(A)

Count I of the amended complaint seeks to assert an action against the defendant pursuant to 11 U.S.C. § 523(a)(2)(A).[3] Because of the plaintiffs' lazy pleading style, it is necessary for the court to seek to sort out averments in the "Facts" section of the amended complaint which may somehow be applicable to Count I.

11 U.S.C. § 523(a)(2) provides three possible bases for the assertion of a claim of exception to discharge:

1. A debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses;

2. A debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by a false representation; or

3. A debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by actual fraud.

With respect to all three of the foregoing provisions, the item of property at issue in this case is "money": "property" outside of the scope of money, "services", or any element involving credit are not involved in this case.

Let's start first with any claim asserted by the plaintiff Joseph Pabon. No claim is stated individually by this plaintiff. With respect to the defendant's obtaining of money, the averments of the amended complaint assert that investments were made at discrete times [rhetorical paragraphs 18-23] by Domenico Lazzaro and by Associated Pathologists. There is nothing in the amended complaint which asserts that Pabon made any individual investment. Thus, any claim sought to be asserted with respect to Pabon under Count I is dismissed with prejudice.

As stated by the amended complaint, discrete initial investments were made by

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[3] In the January 21, 2010 order, any attempted assertion of an action under 11 U.S.C. § 523(a)(2)(B) was dismissed with prejudice. There is thus no claim in this case by the plaintiffs against the defendant pursuant to that provision.

Lazzaro and Associated Pathologists. Thus, the "money" obtained by the defendant which was obtained at the time of the transactions referred to in paragraphs 18-23 of the amended complaint is sufficiently defined for the purposes of Rule 8(a). Paragraph 60 of the amended complaint asserts that "creditors.... continued to contribute capital" pursuant to ongoing representations of Weichman that investments were sound. Reading all that went before in conjunction with the averments of Count I, the best that can be said is that the plaintiffs have asserted that at the time of their initial investments, Weichman stated that the investments would be profitable, and that with respect to Lazzaro's investment in Broadmoor, Weichman told other clients that this vehicle was a tax shelter which was not intended to be profitable [paragraph 22]. As to misrepresentations regarding initial investments, Count 1 essentially states that Weichman advised the investors that the ventures would be profitable, they weren't somehow [again the "how" being absent for the purposes of Rule 9(b)], and that we lost money as a result. Representations as to the projected profitability of investments do not provide a basis for a §523(a)(2)(A) action; *In re Townsley*, 195 B.R. 54, 61-62 (Bankrtcy. E.D. Tex. 1996); *Schwartz & Meyers v. Meyers*, 130 B.R. 416, 423 et seq. (Bankrtcy. S.D. N.Y. 1996). The amended complaint falls far short of alleging a present knowledge of falsity of statements concerning future profitability in the manner required by Rules 8(a) and 9(b), necessary to state a claim under 11 U.S.C. §523(a)(2)(A); *See, In re Brzakala*, 305 B.R. 705, 711 (Bankrtcy. N.D. IL. 2004). Read as broadly as one can read it, the amended complaint asserts that the defendant obtained investments from the plaintiffs and at the time of obtaining them stated that the investment vehicles in which the investments were placed would be profitable. There is nothing in the amended complaint which asserts in the manner required by Rule 9(b) that at the time these prospective assertions were made, the defendant knew or should have subjectively known that in the future the investments would not be profitable, and despite that knowledge, induced the investments to be made.

The circumstances of continued capital contributions in relation to alleged misconduct by Weichman have not been plead sufficiently under Rule 8(a) to assert a causative nexus between alleged actions by the two investing plaintiffs in relation to the alleged inducing fraudulent statements of the defendant at the time the contributions were made. Additionally, to sustain a claim even under the somewhat obtuse theory advanced by the plaintiffs that leaving money in an account is the "obtaining" of money[4], the misrepresentations which led to this passive conduct must be pleaded with specificity under Rule 9(b) – which they have not been.

Turning to the specifics of Count I, rhetorical paragraphs 60 and 61 are the only material matters added by the amended complaint. These averments state the following:

> 60. As a result of the fraudulent representations of Weichman, creditors invested in entities he presented to them as profit making and continued to contribute capital based upon and pursuant to Weichman's ongoing representations that the entities were financially sound.
>
> 61. As a result of false and misleading statements and the failure to speak when under a duty to do so and to disclose all material facts within his knowledge, creditors lost virtually every dollar invested in the above-described investments.

First, there is nothing in the amended complaint which asserts any specific fact as to the assertion in rhetorical paragraph 60 that the plaintiffs "continued to contribute capital": the only specific base facts are those stated as to discrete initial investments, and thus, to the extent that any continued contributions are sought to be made a basis for any claim, the pleading fails to satisfy Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b). Contrary to the requirements of those rules, one is left to speculate as to the identity of the "continued" investors and what "continued" investments are at issue. 11 U.S.C. §523(a)(2)(A) requires that money have been <u>obtained</u> by fraud, and there are no averments sufficient under Rule 9(b) to link alleged fraudulent conduct to the "continued" investments. What is missing is any averment of the actual present alleged

[4] This contention is advanced on pages 6-7 of the plaintiff's response memorandum.

status of the accounts at the time inducements were made to invest more, and the manner in which the actual present status differed from the representations as to that status. Taken together, rhetorical paragraphs 58-61 of the amended complaint state that representations were made on an ongoing basis as to the financial soundness of various investment vehicles. However, these averments, as a basis for fraud necessary to establish actions under 11 U.S.C. § 523(a)(2)(A), do not satisfy the specificity requirements of essentially "how, where, when and what" required by Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b), in part because the "how" (i.e., in what manner ("WHY") were the statements false at the time they were made) as to a loss through fraud is entirely missing. Paragraph 58 states in a conclusory manner that Weichman made false representations in 1989 and 1992, and "at other times" that "the various investments were all doing well", and that "(i)n fact, the opposite was true".[5] What is missing is any particularly pleaded averment that at the time the alleged misrepresentations were made, they were in fact false. How were they false? A sufficient complaint would state, even in general terms:

> I was told that the investment in "X" was performing well; **In fact, the status of the investment in "X" when I was told this was "Y"; Weichman knew or should have known that the statements made as to the status of the investments was false, and he made false statements to induce me to do "Z";** I relied on this statement of the status of the investment in "X" by doing "Z"; Had I known the actual status of my investment in "X" at that time, I would have terminated my investment in "X", and I would not have done "Z"; Because of the fraudulent statements, I sustained a loss.

"Y" is missing in the amended complaint, and "Z" is only conclusorily pled. This complaint states only that by 1993, Lazzaro had quit investing money with Weichman, and that Lazzaro's

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[5] In fact, paragraph 39 refers to alleged statements made in 1992 by Thomas Swihart, conclusorily stated to be "Weichman's agent" – apparently the source of the allegations as to misrepresentations made in 1992. This averments fails under Rule 8(a) to connect these statements to Weichman.

investments resulted in losses. There is nothing which creates more than a suspicion that something more than bad investment advice led to Lazzaro's losses. The same is true to the extent that Count I seeks to assert a claim on behalf of Associated Pathologists.

The court determines that Count I fails to comply with Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b) with respect to claims for obtaining money by false pretenses, a false representation, or actual fraud, and that Count I should be dismissed. Because the plaintiffs have had two bites of the apple in seeking to state claims under 11 U.S.C. § 523(a)(2)(A) and have been unable to do, the dismissal will be with prejudice as to all three plaintiffs.

Count II (Assertions under 11 U.S.C. §523(a)(4)

Count II seeks to assert a claim under 11 U.S.C. § 523(a)(4). This exception to discharge is for a debt for fraud for defalcation, while acting in a fiduciary capacity, in the context of this case.[6]

There are two prongs which are actionable under § 523(a)(4), both of which require a fiduciary capacity to enable. The first is for "fraud"; and the second is for "defalcation".

Giving the incorporated provisions of rhetorical paragraph 6-53 into Count II their due, the court determines that the amended complaint successfully avoids the motion to dismiss on the issue of whether or not a fiduciary relationship existed, principally on the authority of *In re Frain*, 230 F.3d 1014 (7th Cir. 2000) due to the control the defendant is alleged to have exercised over monies entrusted to him by the plaintiffs. In part premised on the last 3 sentences in paragraph 13, and the averments of paragraphs 18, 19,20, 21 and 22, Lazzaro has stated a claim asserting a *Frain*-type fiduciary relationship with Weichman with respect to investments in U.S. Building Partnership; U.S. 30 Restaurant, Inc.; Landings, Inc.; "the Dunes"; and Broadmoor, Inc. However, *Frain* only determined whether or not a "fiduciary" relationship

[6] The complaint does not seek to assert a claim for "embezzlement" or "larceny" under § 523(a)(4).

existed as a result of the factual circumstances of the relationship between essentially passive investors and a controlling investment manager; the case has nothing to do with whether or not the averments by the adversary plaintiffs constituted sufficient information to establish a claim under § 523(a)(4). The establishment of a claim sufficient to survive the defendant's Motion again relies on pleading pursuant to Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b). Mostly, the averments of Count II (taking into consideration what went before) do not state a claim with respect to most of the alleged breaches of fiduciary duty on behalf of the defendant with respect to Lazzaro's investments. There is no connection between the averment in paragraph 66(a) of non-disclosure of potential conflicts of interest to a loss caused by fraud or defalcation. As was true with Count I, the assertion in rhetorical paragraph 66(b) as to representation of profitability does not state a claim under § 523(a)(4). The assertions of paragraphs 66(d) and (e) assert negligence, not fraud or defalcation. However, the assertion in paragraph 66(c) that Weichman charged "exorbitant management fees" and diverted money from investment accounts to his own gain, without complete disclosure of the effect of these payments on the investments made, does raise a glimmer of a claim under *Frain* as to potential defalcation of a fiduciary with respect to payments made to the detriment of the investors to whom the fiduciary owed a duty. Resultantly, the court determines that Count II of the amended complaint states a claim on behalf of Lazzaro against Weichman for "defalcation" under 11 U.S.C. §523(a)(4) with respect to Lazzaro's investments in U.S. Building Partnership; U.S. 30 Restaurant, Inc.; Landings, Inc.; "the Dunes"; and Broadmoor, Inc. However, due to lack of specificity required by Rule 9(b) to assert an action for fraud, the complaint fails to state a claim for "fraud ... while acting in a fiduciary capacity."[7]

[7] As defined by *Frain, supra.*, the complaint alleges an actionable claim under 11 U.S.C. §524(a)(4). The *Frain* claim is not based upon actual fraud, but on a diversion of property/money in violation of a fiduciary relationship, i.e., a "defalcation" apart from conduct constituting actionable fraud.

Next are assertions with respect to Lazzaro's Blunt, Ellis & Leowi investment account. Paragraphs 45, 46,47 and 66(f)– the material averments concerning this claim – state a suspected forgery "on information and belief"; that something unknown happened regarding the account; and that Weichman's services were terminated as a result. These averments fall far short of conforming to Rules 8(a) and 9(d) with respect to pleading a claim under 11 U.S.C.§523(a)(4), and fail to even establish that there is a "debt" arising from the alleged activity [the account was closed, and there is no assertion as to concrete loss sustained from this investment]. Count II fails to state a claim on behalf of Lazzaro as to the Blunt, Ellis & Leowi investment account, and this claim will be dismissed with prejudice.

Finally, there is the claim asserted in paragraph 66(g) with respect to a Blunt, Ellis & Leowi investment account of Associated Pathologists, Inc. With respect to this claim, based upon paragraphs 50, 51, 51, 52, 53 and 66(g)[8] – and other provisions of the amended complaint incorporated into Count II – the court determines that Count II states a claim for "defalcation" under 11 U.S.C.§523(a)(4) on behalf of Associated Pathologists, Inc.. Again, due to lack of specificity required by Rule 9(b) to assert an action for fraud, the complaint fails to state a claim for "fraud ... while acting in a fiduciary capacity" in this context.

As was true with Count I, no individual claim is asserted on behalf of Pabon, and any attempted claim sought to be asserted by Count II on his behalf is dismissed with prejudice.

As a result of the foregoing, the court determines that Count II of the amended complaint will be dismissed with prejudice, with the exception of the following:

1. Claims on behalf of Lazzaro against Weichman for "defalcation" under 11 U.S.C. §523(a)(4) with respect to Lazzaro's investments in U.S. Building Partnership; U.S. 30

[8] Paragraph 49, asserted on the basis of "information and belief", states nothing material, and is essentially rendered moot by paragraph 50, which the court reads to state that despite of, and with knowledge of, the conduct alleged in paragraph 49, money was placed in the Blunt, Ellis & Leowi investment account by Associated Pathologists, Inc..

Restaurant, Inc.; Landings, Inc.; "the Dunes"; and Broadmoor, Inc.;

2. The claim of Associated Pathologists, Inc. against Weichman for "defalcation" under 11 U.S.C. §523(a)(4) stated in rhetorical paragraph 66(g) with respect to the Blunt, Ellis & Leowi investment account of Associated Pathologists, Inc..

Count III (Assertions under 11 U.S.C. § 523(a)(6)

As was true with the original complaint, Count III is essentially a contrivance of multiple "bad acts" alleged against the defendant by the plaintiffs, which the plaintiffs assert led to their harm. While the amended complaint is a little bit clearer with respect to the property interests asserted to be the object of the § 523(a)(6) action, it remains essentially a jumble of assertions that bad things happened and we blame Weichman for them. There are averments that relate to alleged statements made by Weichman as to financial defaults made by the plaintiffs in relation to some alleged investment opportunity. There are averments that Weichman made threats to cause the plaintiffs to lose a contract with the merged Community/Sisters of St. Francis entity, and that by golly the plaintiffs lost a contract they previously held. Paragraphs 79, 80 and 82 assert that Weichman made statements to "the press" [the identity of which does not satisfy the pleading requirements of Fed.R.Civ.P. 8(a)] which led to a bad result. There are averments that Weichman made allegations concerning a threatened malpractice action. The alleged result of all of this conduct by Weichman is that valuable contracts were lost. There are no averments whatsoever that the basis for anyone's determining the non-employment of any of the plaintiffs was directly related to any action by Weichman, apart from essentially speculation that "Weichman did this" and "this happened", and that therefore "Weichman must have caused this to happen". As stated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-1965 (2000):

> White a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . .a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief"

> requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . "[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action".

As stated by the Supreme Court in *Ashcroft v. Iqubal*, 129 S.Ct. 1937, 1949-50 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-557 (2000):

> [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. (citation omitted) Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. (citation omitted) But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief". (citation omitted)

In *In re Whiters*, 337 B.R. 326 (Bankr. N.D.Ind. 2006), the court stated its interpretation of the elements necessary to state a claim under 11 U.S.C. § 523(a)(6). The most critical element of a § 523(a)(6) action is that the debtor's actions caused an "injury" to the person or property interest of the creditor. Count III alleges a parade of things that Weichman purportedly did, and a result adverse to the plaintiffs which occurred. The court views the assertions of the specific acts of Weichman in relation to a negative result to be purely speculation, unsupported by averments sustainable under Fed.R.Civ.P. 8(a).

The court determines that Count III fails to state a claim upon which relief may be granted, and that the defendant's motion to dismiss that count must be granted. Again, because the plaintiffs have now had two bites of the apple with respect to averments under 11 U.S.C. § 523(a)(6) and have yet to state a viable claim, the dismissal of Count III is with prejudice.

III. CONCLUSION

Based upon the foregoing, IT IS ORDERED ADJUDGED AND DECREED as follows:

A. Count I is dismissed with prejudice in its entirety, as to all three plaintiffs.

B. Count II of the amended complaint is dismissed with prejudice, with the exception of the following:

1. Claims on behalf of Domenico Lazzaro against Weichman for "defalcation" under 11 U.S.C. §523(a)(4) with respect to Lazzaro's investments in U.S. Building Partnership; U.S. 30 Restaurant, Inc.; Landings, Inc.; "the Dunes"; and Broadmoor, Inc.;

2. The claim of Associated Pathologists, Inc. for "defalcation" under 11 U.S.C. §523(a)(4) stated in rhetorical paragraph 66(g) with respect to the Blunt, Ellis & Leowi investment account of Associated Pathologists, Inc..

C. Count III is dismissed with prejudice in its entirety, as to all three plaintiffs.

Dated at Hammond, Indiana on September 30, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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